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title in the manner herein discussed has been recognized as a device whereby a spouse may effect what amounts to a testamentary disposition.²⁴

In view of the basis upon which the presumption rests, it is submitted that the Court should have applied it if there was no evidence of an intent to create a present one-half interest in the husband. If the transferees were strangers to each other, there would be no reason to suppose that the intent was to create such right of survivorship. But where they are husband and wife, it is submitted that such an intent has been justifiably presumed. During their joint lives, spouses may, and usually do, enjoy mutually the benefits of property owned by one or the other. For all practical purposes, the funds realized upon a chose in action owned by one of the spouses would find their way to the family purse. It seems reasonable, therefore, to presume that the transfers herein discussed are motivated by concern for the future welfare and security of the surviving spouse. If, in a given case, it is claimed that a gift of a present interest was intended, it is not unreasonable to require evidence of such an intent in order to rebut the presumption.



TORTS—BATTERY ACTION AGAINST FIVE YEAR OLD CHILD UPHOLD.—The plaintiff brought an action against a five year old for battery. The defendant moved a chair and seated himself therein. As the plaintiff was about to sit where the chair had been, defendant attempted to place the chair under her. He was unable to do so and the plaintiff sustained injury. On appeal from a judgment for the defendant, the Supreme Court of Washington remanded, *holding* that, if the defendant had knowledge to a substantial certainty that the plaintiff would attempt to sit down, he would be liable for battery. *Garratt v. Dailey*, 146 Wash. Dec. 186, 279 P.2d 1091 (1955).

Generally, infants are liable for their torts.¹ However, if the tort contains some element which is necessarily wanting in an infant, he will not be liable.² Because liability is ordinarily imposed without regard to the moral quality of the act,³ tender years, of itself, is no

²⁴ See *Belfanc v. Belfanc*, 252 App. Div. 453, 300 N.Y. Supp. 319 (3d Dep't 1937), *aff'd mem.*, 278 N.Y. 563, 16 N.E.2d 103 (1938).

¹ See, e.g., *Bullock v. Babcock*, 3 Wend. 391 (N.Y. Sup. Ct. 1829); *Huchting v. Engel*, 17 Wis. 237 (1863); see COOLEY, *TORTS* 120 (3d ed. 1906).

² *Stephens v. Stephens*, 172 Ky. 780, 189 S.W. 1143, 1145 (1916) (dictum); *Swoboda v. Nowak*, 213 Mo. App. 452, 255 S.W. 1079, 1082 (1923) (dictum); see PROSSER, *TORTS* 1086 (1941).

³ See *Ellis v. D'Angelo*, 116 Cal. App.2d 310, 253 P.2d 675 (1953).

defense.⁴ Consequently, infants have been held liable for battery,⁵ trespass,⁶ and conversion.⁷ The reason advanced for imposing liability without knowledge of wrongfulness is that the law of torts is primarily interested in compensating the injured party.⁸

This rule governing the tort liability of infants has sometimes been reached through legislation,⁹ but more generally has evolved through judicial decision¹⁰ and has been adopted by the Restatement.¹¹ Georgia, however, limits liability by statute to infants over ten years.¹² Although the New York decisions have asserted the general rule, it is noteworthy that in these cases the infant was of such an age as to have the capacity to know the wrongfulness of the act.¹³ This factual limitation appears also in the cases decided in other jurisdictions.¹⁴ There seem to be only three cases holding an infant under seven liable for battery—one an English case decided in 1457.¹⁵ It is the view of English textwriters, however, that today an infant of tender years is not liable for acts of aggression unless he has the *capacity* to know the wrongfulness of the act.¹⁶

The imposition of liability without regard to wrongfulness seems to be a vestige of the absolute liability had at early common law.¹⁷

⁴ *Huchting v. Engel*, *supra* note 1; *Paul v. Hummel*, 43 Mo. 119, 122 (1868) (dictum).

⁵ See, *e.g.*, *Bullock v. Babcock*, *supra* note 1; *Peterson v. Haffner*, 59 Ind. 130 (1877).

⁶ See, *e.g.*, *Conklin v. Thompson*, 29 Barb. 218 (N.Y. Sup. Ct. 1859); *Scott v. Watson*, 46 Me. 362 (1859); *Huchting v. Engel*, 17 Wis. 237 (1863).

⁷ See, *e.g.*, *Shaw v. Coffin*, 58 Me. 254 (1870); *Walker v. Davis*, 67 Mass. (1 Gray) 506 (1854); *Pledge v. Griffith*, 199 Mo. App. 303, 202 S.W. 460 (1918).

⁸ *Ellis v. D'Angelo*, 116 Cal. App.2d 310, 253 P.2d 675, 677 (1953) (dictum); see COOLEY, TORTS 114 (3d ed. 1906); PROSSER, TORTS 1085 (1941).

⁹ CAL. CIV. CODE § 41 (Deering, 1950); LA. CIV. CODE arts. 1785, 1874, 2227 (Dainow, 1947).

¹⁰ See cases cited notes 5-7 *supra*, 13, 14 *infra*.

¹¹ RESTATEMENT, TORTS § 887, comment a (1939).

¹² GA. CODE tit. 105, § 105-1806; tit. 26, § 26-302 (1933), *Riggs v. Watson*, 77 Ga. App. 62, 47 S.E.2d 900 (1948); *Clemons v. Olshine*, 54 Ga. App. 290, 187 S. E. 711 (1936).

¹³ See, *e.g.*, *Rozell v. Rozell*, 281 N.Y. 106, 22 N.E.2d 254 (1939) (16 years); *Conklin v. Thompson*, 29 Barb. 218 (N.Y. Sup. Ct. 1859) (14 years); *Bullock v. Babcock*, 3 Wend. 391 (N.Y. Sup. Ct. 1829) (12 years).

¹⁴ See, *e.g.*, *Peterson v. Haffner*, 59 Ind. 130 (1877) (13 years); *Humphrey v. Douglass*, 10 Vt. 71 (1838) (15 years); *Vosburg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891) (12 years).

¹⁵ See *Ellis v. D'Angelo*, 116 Cal. App.2d 310, 253 P.2d 675 (1953); *Magee v. Willing*, 31 LEGAL INTELL. 37 (1874) (which reports the charge to the jury); Y.B. Mich. 35 Hen. 6, f. 11b, pl. 18 (1457).

¹⁶ See POLLOCK, TORTS 47 (15th ed., Landon 1951) (However, Landon is of a different view.); SALMOND, TORTS 71 (11th ed. 1953); Cook, *Mental Deficiency In Relation To Tort*, 21 COLUM. L. REV. 333, 346 (1921).

¹⁷ See *Weaver v. Ward*, Hob. 134, 80 Eng. Rep. 284 (K.B. 1616); Y.B. Mich. 35 Hen. 6, f. 11b, pl. 18 (1457); 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 375 (3d ed. 1927).

when the courts looked merely to cause and effect.¹⁸ Consequently, the early law was formal and "unmoral."¹⁹ The justification for absolute liability was that if a loss must be borne by one of two innocent persons, it should be borne by the actor.²⁰ The rule imposing liability upon infants seems to be nothing more than a sophisticated refinement of that ancient doctrine.²¹ The law concerning adults, however, has radically changed, and the "unmoral" standard has been replaced by the imposition of liability based on wrongfulness.²² This standard, to be an effective test of liability, must be objective, *i.e.*, would an average man know the act was wrongful.²³

The effect of the incapacity of infants for wrongfulness has been recognized where they have assumed the role of plaintiff.²⁴ Thus, for example, where an infant was injured through the negligence of a railroad, he was not barred from recovery because of his trespass.²⁵ The court there remarked, ". . . they [infants] are not willful trespassers, knowingly doing a wrong . . . which could legally charge them . . . [with] personal responsibility, as in the case of older persons not under such disability."²⁶

In the area of negligence it has been held that an infant is not subject to the same standard of care as an adult,²⁷ because of the infant's limited capacity to foresee the consequences of his acts.²⁸ It is submitted that this limited capacity makes it equally impossible for an infant of tender years to realize the necessity of refraining from acts of aggression.²⁹ Accordingly, capacity for wrongfulness should be a factor in determining the liability of infants for intentional torts³⁰

¹⁸ See Y.B. Mich. 35 Hen. 6, f. 11b, pl. 18 (1457); Wigmore, *Responsibility For Tortious Acts: Its History—III*, 7 HARV. L. REV. 441, 442 (1894).

¹⁹ See Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908).

²⁰ See Leame v. Bray, 3 East 593, 600, 102 Eng. Rep. 724, 727 (K.B. 1803); Lambert & Olliot v. Bessey, Raym. T. 421, 422, 83 Eng. Rep. 220, 221 (K.B. 1681).

²¹ See Bohlen, *Liability In Tort Of Infants And Insane Persons*, 23 MICH. L. REV. 9, 12 (1924).

²² See Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850); Ames, *supra* note 19, at 99.

²³ See HOLMES, *THE COMMON LAW* 108-11 (1881).

²⁴ See, *e.g.*, Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657 (1873); Perry v. Tonopah Mining Co., 13 F.2d 865 (D. Nev. 1915).

²⁵ Huggett v. Erb, 182 Mich. 524, 148 N.W. 805 (1914).

²⁶ *Id.* at 808-09 (emphasis added).

²⁷ See, *e.g.*, Verni v. Johnson, 295 N.Y. 436, 68 N.E.2d 431 (1946); Day v. Cunningham, 125 Me. 328, 133 Atl. 855 (1926); Bentson v. Brown, 186 Wis. 629, 203 N.W. 380 (1925).

²⁸ See, *e.g.*, Lederer v. Connecticut Co., 95 Conn. 520, 111 Atl. 785 (1920); Siedlik v. Schneider, 122 Neb. 763, 241 N.W. 535 (1932); Charbonneau v. MacRury, 84 N.H. 501, 153 Atl. 457 (1931); Shaske v. Hron, 266 Wis. 384, 63 N.W.2d 706 (1954).

²⁹ See Bohlen, *Liability In Tort Of Infants And Insane Persons*, 23 MICH. L. REV. 9, 32-33 (1924).

³⁰ See Ridley v. Young, 64 Cal. App.2d 503, 149 P.2d 76, 80 (1944); Unkelsbee v. Homestead Fire Ins. Co., 41 A.2d 168, 170 (D.C. Munic. Ct. 1945).

in the same manner that mental capacity determines responsibility in the area of negligence.

The Court in the instant case did not consider the defendant's capacity to know wrongfulness, and merely stated that liability for battery was predicated on intent to establish the contact.³¹ It was asserted that the defendant's age was relevant only to determine what he was capable of knowing in reference to the certainty of the contact, and from that knowledge the necessary intent could be inferred.

It is submitted that the ultimate basis of tort liability is wrongfulness.³² However, since the law must operate with externals as its guide, knowledge of wrongfulness has been translated into the objective, average man concept.³³ Consequently, where the act is found to have been done intentionally, the law presumes the moral factor and imposes liability.³⁴ It is indisputable that this judicial technique is just, where the defendant has capacity for wrongfulness. But where the defendant is incapable of knowing wrong, moral responsibility is no longer a possibility; it therefore cannot be presumed. Only a fiction can attribute moral significance to the physical act. The Court in the instant case should have required a finding as to whether or not infants of the defendant's age would have known the act was wrongful. The effect of failing to make such a finding is to impose absolute liability on infants in an area of the law where such should not be the rule.



TORTS — DISPARAGEMENT OF PROPERTY — MISSTATEMENT OF PRICE NOT ACTIONABLE.—Plaintiff marketed a toy airplane which sold for \$3.00. The defendant, in a fictional motion picture, depicted the toy as selling for \$.65. Plaintiff brought suit, alleging that such representation constituted disparagement of property. The Appellate Division *held*, per curiam, that a cause of action was not stated in the absence of allegations showing how the misstatement of price accomplished disparagement of quality. *Marxman Pipes, Inc. v. Columbia Pictures Corp.*, 285 App. Div. 135, 135 N.Y.S.2d 816 (1st Dep't 1954).

Disparagement of property is a form of interference with economic relations. The earliest cases, arising shortly before 1600, involved oral aspersions cast upon the ownership of realty, thereby

³¹ See RESTATEMENT, TORTS § 16, comment a (1929).

³² See Radin, *Speculative Inquiry Into The Nature Of Torts*, 21 TEXAS L. REV. 697 (1943).

³³ See HOLMES, THE COMMON LAW 161-63 (1881).

³⁴ *Id.* at 108.